



CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

VIA ELECTRONIC MAIL AND U.S. MAIL

May 8, 2013

Ignacia S. Moreno
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U.S. Department of Justice
Environment & Natural Resources Division
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Shawn M. Garvin
Regional Administrator
U.S. Environmental Protection Agency, Region 3
1650 Arch Street
Mail Code: 3RA00
Philadelphia, PA 19103-2029

Re: Notice of Lodging of Proposed Consent Decree
United States v. Honeywell Resins & Chemicals LLC
D.J. Ref. No. 90-5-2-1-09611

Dear Ms. Moreno and Mr. Garvin:

I write to you on behalf of the Chesapeake Bay Foundation, Inc. (CBF), concerning the recent consent decree between the United States, the Commonwealth of Virginia, and Honeywell Resins & Chemicals, LLC (Honeywell) that has been lodged with the U.S. District Court for the Eastern District of Virginia. The purpose of this letter is not to criticize the government's decision to settle this matter but, to raise an issue of concern with respect to the government's decision to extract a penalty of \$3 million (\$1.5 to the United States and \$1.5 million to the Commonwealth) and not require a Supplemental Environmental Project (SEP) that would offset the environmental harm to the Chesapeake Bay caused by Honeywell's years of non-compliance.

We see this is as a problem not just with the resolution of this case but, with other judicial and administrative actions resolved by EPA in Region III. This letter is addressed to the both of you in the hopes of initiating a conversation between CBF, DOJ trial attorneys, and EPA assistant regional counsel to discuss opportunities for SEPs or mitigation projects that would offset environmental harm caused to the Chesapeake Bay region by violations of federal environmental laws.

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Background

CBF is a nonprofit corporation based in Annapolis, Maryland. It is the only independent 501(c)(3) organization dedicated solely to restoring and protecting the Chesapeake Bay and its tributary rivers and streams by improving water quality and reducing pollution. CBF has over 235,800 members, volunteers, and electronic subscribers nationwide. To achieve its goals, CBF has, among other things, spent millions of dollars planting trees, installing best management practices on farms, planting oyster beds, and preserving wetlands throughout the Bay watershed in an effort to reduce nitrogen, phosphorous, and sediment pollution.

CBF's education program operates in the District of Columbia, Maryland, Pennsylvania, and Virginia. The program focuses on teaching Bay ecology to students and teachers by taking them on canoe, kayak, boating and hiking trips on and along the Bay and its tributaries.

CBF's advocacy and policy arm has been actively involved in efforts to restore the Chesapeake Bay and its tributaries for over 40 years by working with citizens, industry and government to insure that sensible legislation is passed and meaningful regulations are promulgated. CBF has been actively engaged in the development of the several Chesapeake Bay Agreements, President Obama's 2009 Executive Order on the Bay, the Chesapeake Bay TMDL and the state Watershed Implementation Plans designed to achieve the pollution allocations set forth in the TMDL.

CBF has also used litigation, where appropriate, as a means to either support government (federal, state, and local) actions that restore and protect the Chesapeake Bay or to challenge government decisions that impair those actions. Litigation has also been used to bring citizen enforcement actions against those that violate state and federal environmental laws.

CBF's primary focus in terms of advocacy, education, litigation, policy, and restoration has been to reduce the amount of nitrogen, phosphorous, and sediment deposited or discharged to the Chesapeake Bay and its tributaries to improve water quality both in the Bay and locally. Thus, any enforcement action brought by the federal government which is directed at reducing the emission or discharge of these pollutants is important to CBF.

SEP Policy

As you know, SEPs are meant to mitigate the penalty stipulated to by the parties. To ensure appropriate SEPs tailored to the facts of each case, EPA issued a SEP Policy in 1998. Final Supplemental Environmental Policy Projects, Effective May 1, 1998, EC-P-1998-159-III-A-01 ("Policy"). One of the major features of that Policy was the addition of a section encouraging community input in developing projects in appropriate cases. Memorandum from Steven A. Herman to Regional Administrators, April 10, 1998. However, because the basic parameters of a settlement are developed during negotiations between DOJ trial attorneys, EPA regional attorneys, and opposing counsel, there has been little opportunity for community input before the consent decree has been signed and lodged with the court. At that point, the public has no ability to insure that a SEP will be incorporated into the decree. Consistent with EPA's

Policy, we believe EPA should provide the public a more effective opportunity to suggest SEPs to the government prior to the signing and lodging of a consent decree.

EPA's SEP policy also prefers projects that involve pollution prevention. Most of the SEPs we would have suggested in the Honeywell matter and in other Region III settlements would have been designed to reduce pollution to local waterways and the Chesapeake Bay through the installation of best management practices such as stream buffers and tree plantings that would prevent nitrogen, phosphorous, or sediment from reaching bodies of water.

EPA's Policy recognizes Environmental Justice concerns as stated in Executive Order 12898. *See* EPA's Environmental Justice Strategy 1995, Objectives for Enforcement Compliance and Regulation, Objective 1. Those concerns have been highlighted in former Administrator Jackson's decision to make environmental justice a priority for EPA, *see* EPA Strategic Plan for 2011-2015, and recent EPA publications including Plan EJ 2014, Section 3.3. Thus, EPA's Policy favors an opportunity for public participation and SEPs in communities where environmental justice concerns are present.

The Honeywell Violations and the Consent Decree

As you know, Honeywell violated numerous provisions of the Clean Air Act for several years. Some of those violations allowed large quantities of nitrogen oxides (NOx) to be emitted into the atmosphere from Honeywell's facility in Hopewell, Virginia, downriver from the Presquile National Wildlife Refuge and upriver from the James River National Wildlife Refuge. These violations permitted approximately 8 – 9 tons of NOx to be illegally emitted each year for over a decade. Much of this illegal nitrogen was either deposited on the earth and washed into the Bay or its tributaries, or was deposited directly into those bodies of water. Given that the Bay and many of its tributaries are impaired due to excess nitrogen, it would have been highly appropriate for the governments to require Honeywell to take actions that prevent nitrogen from reaching these bodies of water.

For example, SEPs that absorb nitrogen in stormwater include the reforestation of farm land by planting trees and fencing cattle out of streams. A recent farm restoration project conducted by CBF cost approximately \$3,500 per acre. (200 trees @ \$9 = \$1800; 200 tree shelters @ \$3 = \$600; 200 holes augured @ \$2 = \$400; maintenance @ \$700). Another project would help farmers transition from typical confinement dairy/ beef cattle operations to grazing operations. This greatly reduces fossil fuel consumption thereby reducing NOx emissions and increasing carbon sequestration while also capturing nitrogen deposited from air emissions. The SEP could convert row crop field to pasture at approximately \$300 per acre, stabilize stream crossings at around \$5,000 each, exclude cattle from streams at \$3.50 per ft., and reforest riparian buffers at \$3,200 per acre. Such a SEP could include alternative watering systems.

Moreover, given the demographics of Hopewell, approximately 40% non-white and a median income of \$33,196, there are several SEPs that could have been proposed that would have prevented pollution and addressed environmental justice concerns. For example, like most urban areas in the Bay region stormwater runoff is a significant problem in Hopewell.

Moreover, there is limited public access to the Appomattox and James Rivers. Shoreline buffer areas could be restored with vegetation designed to capture nitrogen in stormwater and allow public access to the rivers for boating, fishing, and swimming.

Another possible project in urban areas is the construction of rain gardens. Rain gardens help slow and filter runoff which helps prevent streambank erosion, sedimentation, and poor in-stream water quality. In 2012, CBF staff worked with community volunteers, students and their parents, and teachers to design and install rain gardens at two schools in Richmond, just upriver from Hopewell. In addition to the pollution prevention benefits of the projects, both rain gardens act as educational tools for the students, providing an opportunity to teach children about local water quality issues. The 20x30' rain garden at one school cost \$714 and retains stormwater from 6 downspouts and sidewalks – about 2000 sq ft of impervious surface.

Other Settlements

We note that the Agency has obtained some substantial SEPs in other judicial cases and we applaud those results. *See, e.g., United States v. Motiva Enterprises, LLC*, DDE (2006)(SPCC/NPDES violations, several SEPs valued at \$6.385 million); *United States v. City of Reading* (NPDES violation, \$563,000 SEP to removed sediment and install buffers)(2005). However, the majority of those occurred more than five years ago. In addition, we were not able to examine the full description of the SEPs in the administrative cases as they were not available on the ECHO database so, in some cases, we were not able to determine what pollution reduction they provided and whether they addressed environmental justice concerns.

We have examined a few recent judicial settlements within Region III and note several in which a significant penalty was paid and no SEP was required. For example, as part of the recent settlement with Hovnanian builders, the United States received \$864,000 in penalties. No funds were set aside for a SEP despite the fact that they concerned erosion and sediment control violations at construction sites in D.C, Maryland, Virginia, and West Virginia – all Bay jurisdictions. *United States, et al. v. Hovnanian Enterprises, Inc.*, E.D. PA (2010). *See also United States, et al. v. Beazer Homes*, M.D. TN (2010) (\$731,336 penalty for similar CWA violations some of which occurred in Maryland and Virginia). EPA recently administratively settled another Clean Water Act matter in Maryland against Hovnanian Homes for \$130,000. (Shipley Farms/Palisades). No SEP was recorded.

In addition to Clean Water Act matters, there have been several recent Clean Air Act settlements concerning illegal NOx emissions within the Chesapeake Bay airshed which includes Ohio, New Jersey, North Carolina, and parts of Illinois, Kentucky, Tennessee, and South Carolina in addition to the Bay states. Sources within these states like coal fired power plants and cement kilns contribute large amounts of nitrogen to the Bay and its tributaries. While some of the settlements that have significant penalties but fail to provide for a SEP occur outside of Region III, *see, e.g., United States v. American Municipal Power*, S.D. Ohio (2010)(\$850,000 penalty), others concerned air violations within Bay states, *see, e.g., United States, et al. v. INVISTA*, DDE (2009)(\$850,000 penalty, no SEP)(one of the facilities is in Seaford, DE). We

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believe that in each of these cases a SEP designed to prevent nitrogen from reaching the Bay or its tributaries would have been appropriate.

Proposal

We recognize that a SEP may not be appropriate in every case but, we do believe that many settling parties would be willing to provide funding for beneficial projects as a means of addressing the overall penalty assessed. To ensure that government lawyers are aware of the kinds of projects that are potentially available in their cases, we would like the opportunity to discuss these options with EPA and DOJ attorneys. In that way, when they are presented with a case, either administrative or judicial, in which a penalty will be assessed for violations that are related to nitrogen, phosphorous or sediment pollution, they are equipped to suggest SEPs that will reduce pollution and address environmental justice concerns.

If either of you are interested in such a discussion, please contact me at your earliest convenience.

Sincerely,



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